

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-218234.3 **DATE:** May 3, 1985

MATTER OF: NKF Engineering Associates, Inc.--
Request for Reconsideration

DIGEST:

1. A dismissal with prejudice by a court of competent jurisdiction constitutes a final adjudication on the merits of a complaint, which is conclusive not only to issues decided by the court, but also as to all issues that might have been decided. GAO therefore affirms a prior decision dismissing a protest which involved issues which were or could have been before the court.
2. A request for reconsideration of a prior decision must be filed (received) not later than 10 working days after the basis for reconsideration is known or should have been known, whichever is earlier.

NKF Engineering Associates, Inc. requests reconsideration of our decision in Santa Fe Corp., B-218234.2, Mar. 27, 1985, 64 Comp. Gen. ____, 85-1 CPD ¶ 361, in which we dismissed Santa Fe's protest against the award of a contract to Allied Defense Industries (ADI) under solicitation No. N00033-84-R-0110, issued by the Department of the Navy, because a court of competent jurisdiction had earlier dismissed with prejudice the firm's suit for injunctive relief in the matter. NKF, which joined with Santa Fe in filing the suit, and which had also submitted comments on Santa Fe's protest, complains that it raised two issues relating to the award which were not considered by the court, and therefore that this Office retains jurisdiction under our bid protest function and must now decide those issues. We affirm our prior decision.

Santa Fe had originally protested to this Office against the award to ADI, alleging that the award was

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improper because Santa Fe's offer was more advantageous to the government, cost and other factors considered, and because a former Santa Fe employee had participated in the evaluation process. Subsequently, NKF, another disappointed offeror, protested to the agency that ADI was not an eligible small business concern for purposes of the solicitation. The agency and Santa Fe then agreed to suspend action on Santa Fe's protest until the Small Business Administration (SBA) issued a final ruling on ADI's size status, and we closed our file on the protest.

The SBA Office of Hearings and Appeals found ADI qualified as a small business for purposes of the solicitation. On February 19, 1985, Santa Fe and NKF filed suit in the United States District Court for the District of Columbia (Civil Action No. 85-0599) seeking injunctive relief to prevent the Navy from implementing the award to ADI. The grounds for the suit were that ADI was not eligible as a small business concern because of its affiliation with a foreign firm, that the award to ADI was precluded by the conflict of interest provision in the solicitation, and that several contract provisions were rendered unenforceable by ADI's affiliation with the foreign corporation.

The court dismissed the complaint with prejudice, concluding that the plaintiffs had failed to show any wrongful act by the government. Santa Fe then filed a new protest with this Office. In the protest, Santa Fe raised the same issues presented in its suit for injunctive relief as well as the issues contained in its original protest, not expressly raised in the suit, which were that Santa Fe's offer was more advantageous to the government and that the participation of Santa Fe's former employee in the evaluation process was improper.

In our March 27 decision, we dismissed Santa Fe's protest because a dismissal with prejudice by a court constitutes a final adjudication on the merits and bars further action by this Office. See Cecile Industries, Inc., B-211475.4, Sept. 23, 1983, 83-2 CPD ¶ 367. We emphasized that the effect of such a judgment extends not only to matters which were decided, but also to all matters that might have been decided. See Frontier Science Associates, Inc.--Reconsideration, B-192654, Dec. 26, 1978, 78-2 CPD ¶ 433. Since the issues relating to the allegedly more advantageous nature of Santa Fe's offer and to

the participation of its former employee in the evaluation process could have been raised in the court action, we held that the court's dismissal of the suit was a full adjudication on the merits of the issues presented in Santa Fe's protest, and thus we would not consider them further.

For the same reason, we would not consider NKF's allegations, raised in its comments on Santa Fe's protest, that the solicitation should have provided for the evaluation of estimated travel and per diem costs, and that the agency engaged in improper price discussions with ADI prior to the submission of best and final offers. We concluded that since NKF had joined with Santa Fe in the suit, and could have raised these two issues at that time, our consideration of them would be improper in view of the court's dismissal of the suit with prejudice. Furthermore, it appeared that NKF's allegations were, in any event, untimely raised under section 21.2(a) of our Bid Protest Regulations, 4 C.F.R. pt. 21 (1985).

NKF now urges that our March 27 decision should be reconsidered because, during the District Court hearing, attorneys for Santa Fe and NKF attempted to introduce issues that had been raised in the firms' protests to this Office, but the judge refused to consider them because they did not pertain to the suit against the SRA's determination that ADI was eligible as a small business concern. Accordingly, NKF contends that this Office retains jurisdiction under our bid protest function and must now consider those issues. We disagree.

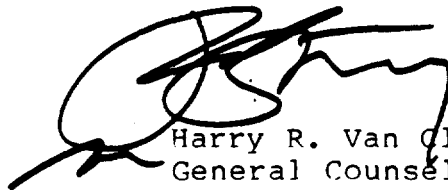
We have reexamined the firms' pleadings in the suit, and nowhere do we find that the issues NKF would now have us consider were ever brought before the court. See Fed. R. Civ. P. 8(a)(2), which provides that a pleading shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. (Although ultimate facts need not be pleaded, the complaint must give the defendant adequate notice of the grounds for relief. Wade v. Johnson Controls, Inc., 693 F.2d 19 (2nd Cir. 1982).) As we stated in Frontier Science Associates, Inc.--Reconsideration, supra, where a protester similarly urged reconsideration of our decision dismissing its protest because all of the grounds of protest before this Office were not specifically submitted to the court, the essential point is that the issues could have been

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submitted, but were not. Therefore, the court's denial of the firm's complaint for injunctive relief operated as a full adjudication on the merits. We see no distinction to be drawn in the present matter, and, therefore, no basis for reconsideration of our March 27 decision.

In any event, we believe that NKF's request for reconsideration is untimely. Our Bid Protest Regulations provide that such requests shall be filed (received) not later than 10 working days after the basis for reconsideration is known or should have been known, whichever is earlier. See 4 C.F.R. § 21.12(b). Here, NKF's request for reconsideration was not received until April 18, a date beyond 10 working days after the firm should have received our March 27 decision. See TeOcom, Inc.--Reconsideration, B-212425.2 et al., July 17, 1984, 84-2 CPD ¶ 55.

Our prior decision is affirmed.



Harry R. Van Cleve
General Counsel